

Decision

Matter of: CMSOft, Inc.

File: B-419370

Date: January 26, 2021

Francoise Farhat for the protester.

Colonel Patricia S. Wiegman-Lenz, Kyle E. Gilbertson, Esq., Tiffany R. Schwartz, Esq., and Max V. Kidalov, Esq., Department of the Air Force, for the agency.

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DIGEST

Protest challenging agency's method for calculating required work allocation is denied where the method used was reasonable and consistent with the proposal submission instructions, applicable guidance documents, and statutory requirements.

DECISION

CMSOft, Inc., a small business located in Palo Alto, California, protests the rejection of its proposal by the Department of the Air Force under the Department of Defense's (DOD) Small Business Technology Transfer (STTR) program broad agency announcement (BAA) 18A, topic number AF18A-T004, which sought multi-physics models for parachute deployment and braking. The protester asserts that the agency unreasonably calculated the percentage of work proposed for CMSOft's teaming partner, resulting in CMSOft's proposal being found ineligible to proceed to the next phase.

We deny the protest

BACKGROUND

The STTR program is a government-funded program that solicits proposals, in three phases, from domestic small business concerns to engage in federal research/research and development (R/R&D). In phase one (project feasibility), the agency evaluates the scientific, technical and commercial merit of the ideas submitted. Agency Report (AR), Tab 1, Contracting Officer's Statement (COS) at 2. In phase two (technology development), major research and development is funded to develop projects into technology to support the warfighter. *Id.* at 3. In phase three (commercialization), small businesses are expected to obtain non-STTR government or private funding to

transition phase two technologies into a product or service for the government and commercial marketplace. *Id.*

Agencies use the STTR program to award contracts or grants to small business concerns that are participating in cooperative research and development. See 15 U.S.C. § 638(e)(6). “Cooperative research and development” is defined as “research or research and development conducted jointly by a small business concern and a research institution in which not less than 40 percent of the work is performed by the small business concern, and not less than 30 percent of the work is performed by the research institution.” 15 U.S.C. § 638(e)(7). This 30 percent work allocation requirement is also included in section 6(a)(2) of the Small Business Administration’s (SBA) Small Business Innovation Research (SBIR)/STTR Policy Directive.

The BAA included a requirement, at section 4.2(b), implementing this work allocation:

A minimum of 40 [percent] of each STTR project must be carried out by the small business concern and a minimum of 30 [percent] of the effort performed by the research institution. . . . The percentage of work is usually measured by both direct and indirect costs, although proposers planning to subcontract a significant fraction of their work should verify how it will be measured with their Component Contracting Officer during contract negotiations.

AR, Tab 3, BAA at 12. (emphasis in original).

On November 29, 2017, DOD issued the BAA to solicit STTR proposals; included in the BAA were instructions for the preparation of phase one proposals. COS at 3. The instructions included seventeen topic areas for research and development proposal submissions. As relevant here, topic AF-18A-T004 related to multi-physics models for parachute deployment and braking, and sought the development of efficient methods of modeling and predicting the behavior of thin, aeroelastic surfaces such as parachutes and their effect on bodies of interest. AR, Tab 4, Phase One Instructions at 13. The phase one instructions also required the involvement of a research institution and stated that the “STTR offeror’s involvement must equate to not less than 40 percent of the overall effort and the research institution[’]s must equate to not less than 30 percent.” *Id.* at 4.

On January 8, 2018, CMSOft submitted a phase one proposal that was selected for a phase one award on September 15, 2019. COS at 5. On March 22, the Air Force provided CMSOft with instructions for submitting a phase two proposal. *Id.* at 6. The phase two proposal instructions contained a similar work allocation requirement as before:

In accordance with the Small Business Administration (SBA) SBIR Policy Directive, a minimum of 40 [percent] of the R/R&D must be performed by the proposing firm, and a minimum of 30 [percent] of

the R/R&D performed by the research institution, unless otherwise approved in writing by the Contracting Officer.

AR, Tab 9, Phase Two Instructions at 7 (emphasis in the original).

On July 22, 2019, CMSoft submitted its phase two proposal. As with its phase one proposal, CMSoft represented that 30.47 percent of the work would be performed by a research institution. AR, Tab 11, CMSoft Phase Two Proposal at 2. This representation was based on a calculation using the following ratio:

$$\frac{\text{Research Institution Costs}}{\text{Total Direct Labor CMSoft + Fringe Benefits for CMSoft + Subcontractor Costs}^1}$$

Protest, exh., Cost Summary at 1.

On September 30, 2020, the Air Force notified CMSoft that its proposal failed to meet the required research institution work allocation and was therefore ineligible for award. COS at 9. This determination relied on the agency's calculation that CMSoft had allocated only 22 percent of the work to a research institution based on the ratio of the research institution costs relative to the total award dollars. *Id.* at 9.

The agency's work allocation calculation used the same numerator (research institution costs) as CMSoft had in its calculation. In contrast to CMSoft, however, the agency included the following additional costs in the denominator of the ratio: travel costs, general and administrative costs (G&A), and profit. The agency further noted that even without including profit in the calculation, CMSoft would still not meet the 30 percent requirement. *Id.*

This protest followed.

DISCUSSION

CMSoft argues that the agency's work allocation calculation was unreasonable because while the phase two proposal instructions required the research institution to perform 30 percent of the R/R&D, the agency calculated the percentage in relation to the total award dollars. The protester argues that the total award dollars went beyond what qualified as R/R&D and included travel, G&A costs, and profit. By doing so, the protester contends the Air Force engaged in "mixing apples and oranges" by conflating the total R/R&D with the total award dollars. Comments at 7.

In support of this argument, CMSoft notes that the phase two instructions did not direct a total award dollars approach but instead required the partnered research institution to

¹ There were two listed subcontractors, one of which was the research institution.

perform 30 percent of the R/R&D. The protester asserts that a more reasonable interpretation of the term R/R&D would encompass only the work performed by both CMSOft and its subcontractors and would exclude costs and fees such as travel, G&A, and profit. The protester notes that the Air Force has accepted this type of calculation in at least two prior procurements--including phase one of this procurement.² CMSOft also notes that the National Aeronautics and Space Administration (NASA) uses this same calculation method for its STTR procurements.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. *Intelsat General Corp.*, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8. Where a protester and agency disagree about the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Crew Training Int'l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *Argus Int'l Risk Servs., LLC*, B-411682, B-411682.2, Sept. 25, 2015, 2015 CPD ¶ 303 at 5. Where an ambiguity is patent, *i.e.*, obvious, gross, or glaring, and is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the term. *Id.*

Here, we find that the agency's interpretation of the allocation requirement was reasonable.³ In this respect, the instructions did not set forth how the total "R/R&D" would be calculated or limit the term to the elements used by CMSOft, *i.e.*, direct labor costs, fringe costs, and subcontractor costs. In the absence of such an explanation within the phase two instructions, it was reasonable for the agency to use the BAA's allocation instructions for guidance. The BAA provided that the "percentage of work is usually measured by both direct and indirect costs[.]" AR, Tab 3, BAA at 12. Indirect costs are defined under the cost accounting standards as "any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or with at least one intermediate cost objective." 48 C.F.R. § 9904.402-30(a)(5). Such indirect costs can include G&A costs, fee/profit and travel costs. See,

² The agency contends that it did not evaluate CMSOft's phase one proposal for compliance with the work allocation requirement. See AR, Tab 2, Memorandum of Law at 7.

³ While the protester argues that the Air Force and NASA previously interpreted this requirement in the manner espoused by CMSOft, as our Office has recognized, each procurement stands on its own. See *SDS Int'l*, B-285822, B-285822.2, Sept. 29, 2000, 2000 CPD ¶ 167 at 7 n.2. Accordingly, the assertion that the agency calculated the method differently in another procurement does not establish the unreasonableness of its current interpretation where the interpretation is consistent with the BAA and the SBIR/STTR Policy Directive.

e.g., *MicroTechnologies, LLC*, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 3.

The agency's interpretation of the requirement is also consistent with the SBIR/STTR Policy Directive, which was specifically referenced in the phase two proposal instructions. The SBIR/STTR Policy Directive states that an agency can measure this performance of work requirement "using the total award dollars or labor hours[.]"⁴ SBA SBIR/STTR Policy Directive at 84.⁵ Here, the Air Force compared the research institution costs to CMSOft's total award dollars.

The protester argues that the agency's interpretation of the requirement is unreasonable because it adds costs, such as the G&A costs, to the denominator of the work allocation ratio without accounting for them in the numerator. The protester notes that, in its proposal, its G&A rate was applied to a cost base that included both CMSOft's direct labor and its subcontractor costs. See AR, Tab 11, CMSOft Phase Two Proposal at 57. The protester argues that it was therefore unreasonable for the Air Force to only include G&A costs in the denominator, since such costs applied to both the prime contractor's and the subcontractor's costs.

We find the agency's inclusion of the G&A costs in the denominator (but not the numerator) to be reasonable, however, because the G&A costs are not costs that reflect the research institution's effort on the contract. Instead, they reflect the general and administrative expenses incurred by CMSOft. According to the protester, the administrative expenses incurred by the research institution were included in the numerator of the ratio as a component of the research institution's costs. See Protester's Response to GAO's Request for Information, Dec. 3, 2020, at 4, citing AR, Tab 11, CMSOft Phase Two Proposal at 58. While CMSOft's G&A costs were applied to a cost base that included the research institution's costs (along with CMSOft's direct labor and the travel costs), we are not persuaded that this means such costs should be attributed to the research institution's performance of the contract for purposes of the work allocation requirement.

The protester further argues that the agency should have alternately calculated the research institution's performance on the contract using a comparison of the labor hours proposed for the research institution relative to the total labor hours. In support of this

⁴ The SBIR/STTR Policy Directive also requires the agency to "explain to the small business in the solicitation how it will be measured." SBA SBIR/STTR Policy Directive at 84. While the protester argues that the agency failed to comply with this requirement, we find that this argument amounts to an untimely challenge to the terms of the phase two instructions, specifically the absence of an explanation of the calculation method to be used by the Air Force. See *Mission1st Group, Inc.*, B-413028.4, Nov. 20, 2017, 2017 CPD ¶ 364 at 5 n.3.

⁵ Available at https://www.sbir.gov/sites/default/files/SBIR-STTR_Policy_Directive_including_Preamble_2019.pdf (last visited on January 22, 2021).

point, the protester notes that the SBA's SBIR/STTR Policy Directive provides that labor hours can be one acceptable method to calculate the applicable work allocation. CMSoft contends that hour information for its research institution personnel can be derived from information found in CMSoft's proposal regarding the number of months and percentage of time they would work. AR, Tab 11, CMSoft Phase Two Proposal at 58. Measured this way, CMSoft asserts that its research institution should have been credited with performing 40.96 percent of the requirement.

We find this argument to be untimely, however, because it was first raised in the protester's comments on the agency report. In this respect, the protester was notified of the agency's ineligibility determination on September 30, 2020, but did not raise this argument until its comments filed on November 30. We find that the piecemeal presentation of this protest ground does not satisfy our Office's timeliness rules. See *Synergy Solutions, Inc.*, B-413974.3, June 15, 2017, 2017 CPD ¶ 332 at 7 (our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues).⁶

In sum, we find that the agency reasonably interpreted the work allocation requirement contained in the phase two instructions. To the extent that CMSoft's interpretation of the allocation requirement was also reasonable, these two reasonable interpretations gave rise to an ambiguity that was clear from the face of the phase two instructions, specifically from the absence of an explanation as to how the agency planned to calculate the work allocation. Where, as here, a patent ambiguity is not challenged prior to the submission of proposals, we will not sustain any subsequent protest that is based on one of the alternative interpretations as the only permissible interpretation. *U.S. Facilities, Inc.*, B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁶ Even if this argument had been timely, we would not have found it meritorious. In this respect, nothing in the phase two instructions or the SBIR/STTR Policy Directive required the agency to use the labor hour method of calculating the work allocation requirement rather than the total award dollars method. We note too that the labor hour information included in CMSoft's proposal would have required the agency to make certain assumptions about the number of hours represented by terms such as ".5 month per year." AR, Tab 11, CMSoft Phase Two Proposal at 58. In sum, we find that the agency acted reasonably in calculating the work allocation using total award dollars rather than labor hours.